Supreme Court, U. S.
FILED
DEC 3 1979
MICHAEL RODAK, JR., CLERK

79-853
No.

In the
Supreme Court of the United States
OCTOBER TERM 1979

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS by next friend and father, ANTOINE WADIEH ELIAS, CLAUDETTE PAULINE ELIAS by next friend and father, ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR, all citizens and residents of Chicago, Cook County, Illinois, and LOUIS TAZBAZIAN, a citizen and resident of Montreal, Canada,

Plaintiffs-Petitioners,

vs.

A & C DISTRIBUTING COMPANY, INC., a Tennessee Corporation licensed to do business in the State of Tennessee, and,

its agent, servant and employee, GERETT LEE JOHNSON, a citizen and resident of Nashville, Davidson County, Tennessee,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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SUPREME COURT OF THE UNITED STATES

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No.

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS by next friend and father, ANTOINE WADIEH ELIAS, CLAUDETTE PAULINE ELIAS by next friend and father, ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR, all citizens and residents of Chicago, Cook County, Illinois, and LOUIS TAZBAZIAN, a citizen and resident of Montreal, Canada,

Plaintiffs-Petitioners,

vs.

A & C DISTRIBUTING COMPANY, INC., a Tennessee Corporation licensed to do business in the State of Tennessee, and,

its agent, servant and employee, GERETT LEE JOHNSON, a citizen and resident of Nashville, Davidson County, Tennessee,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioners pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Tennessee, rendered September 4, 1979, denying,

per curiam, leave to appeal from the decision of the Court of Appeals of the State of Tennessee, Middle District, rendered on June 29, 1979, in the above-entitled cause.

CITATIONS TO THE OPINIONS BELOW

The decision of the Court of Appeals of the State of Tennessee, Middle District, is yet unreported as is the *per curiam* order of the Supreme Court of the State of Tennessee. Both are included in the appendix to this Petition.

JURISDICTIONAL STATEMENT

The judgment of the Tennessee Supreme Court denying leave to appeal was entered on September 4, 1979. Tennessee appellate procedure does not permit a petition for rehearing to be filed. This Petition for Certiorari was filed within ninety days of the entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State may, consistent with the Full Faith and Credit clause, refuse recognition for purposes of its savings statute to a judicial proceeding solely because that proceeding was brought in another state.

2. Whether a State may, consistent with rights guaranteed by the Privileges and Immunities, Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, deny the benefits of its savings statute to a plaintiff who is forced to refile in that State a lawsuit which had first been timely brought in another State.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article IV, Section 1, United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, records and judicial Proceedings of every other State. . . ."

Fourteenth Amendment, United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 United States Code, Section 1738:

> ". . . Such Acts, Records and judicial Proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state, Territory, or Possession from which they are taken."

Tennessee Code Annotated, Section 28-106:

> "If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

Illinois Revised Statute, Chapter 83, Section 24(a):

> "In the actions specified in this act or any other act or contract when the time for commencing an action is limited, if a judgment is given for the plaintiff but reversed on appeal; or if there is a verdict for

the plaintiff and, upon matter alleged in arrest of judgment, the judgment is given against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the action is voluntarily dismissed by the plaintiff or the action is dismissed for want of prosecution."

STATEMENT OF FACTS

This is an action grounded in tort based upon an automobile accident involving the named plaintiffs, all of whom are residents of Illinois except Louis Tazbazian, who is a citizen of Canada and on whose behalf rights under the Constitution are not claimed, and a vehicle owned and operated by the defendant Tennessee corporation. The accident occurred on May 21, 1976. Plaintiffs, relying in good faith upon the Illinois long-arm statute for jurisdiction over the defendants, brought suit in the Circuit Court of Cook County, Illinois, filing the complaint on May 12, 1977, and within the Illinois statute of limitations. On June 13, 1977, an order was entered upon motion of the defendant dismissing the case for lack of jurisdiction. This order was vacated on July 20, 1977, and an order entered dismissing the case with prejudice. The order was further amended on August 19, 1977, to read: "with prejudice solely on the issue of Illinois jurisdiction. . . ." At this point, Illinois proceedings on the cause of action were terminated.

On April 17, 1978, within one year of the commencement of the Illinois proceeding, and moreover within one year of any order dismissing that case, suit was brought in the Circuit Court of Davidson County, Tennessee, the same plaintiffs alleging as a cause of action against the same defendant that accident which had given rise to the previous suit in Illinois. The defendants moved to dismiss the action as barred by the Tennessee statute of limitations. The trial court entered an order on October 26, 1978, denying the defendant's motion, but certifying to the Tennessee Court of Appeals as a controlling question

of law the issue raised by the defendant concerning the applicability of the Tennessee savings statute, Tennessee Code Annotated, § 28-106. The issue was briefed and oral argument held before the Tennessee Court of Appeals, plaintiffs arguing that proper statutory construction and the clear input of previous decisions of the Tennessee courts required an interpretation of the Tennessee savings statute, which included out-of-state judicial proceedings. The defendant argued for a contrary interpretation, relying principally upon a decision more than 100 years old involving the doctrine of *lis pendens,* and upon the fact that a majority of the decisions interpreting state savings statutes have held that judicial proceedings brought in other States are excluded. The Court of Appeals agreed with the defendants, and an opinion dated June 29, 1979, held that the Tennessee savings statute made reference only to actions originally brought in Tennessee, and that the institution of judicial proceedings in Illinois did not toll the running of the Tennessee statute of limitations. Plaintiffs moved the Tennessee Supreme Court for leave to appeal the decision, which that Court denied on September 4, 1979.

Of necessity, appellants raise the Constitutional issues presented for the first time in this petition. In so doing, Petitioners recognize this Court has repeatedly held that federal questions are not timely raised when first raised in a jurisdictional statement or notice of appeal to the Supreme Court, *White River Lumber Company* v. *Arkansas ex rel. Applegate,* 297 U.S. 692, 700 (1928); *Whitney* v. *California,* 274 U.S. 357, 362-3 (1926); *Hiawassee River Power Company* v. *Carolina-Tennessee Power Company,* 252 U.S. 341, 344 (1919); *Thomas* v. *Iowa,* 209 U.S. 258 (1907); *Raley* v. *Ohio,* 360 U.S. 423, 434-6 (1958). The

peculiar circumstances of this case, however, justify the application of an exception to the rule.

The decision of the Court of Appeals for the State of Tennessee was utterly unexpected by the appellants, in that the court gave the statute a new and unanticipated construction which deprives these appellants of rights under the cited clauses of the United States Constitution. See, *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673, 677-8 (1929). The statute did not come to have an unconstitutional effect until the Tennessee courts decided that judicial proceedings brought in another State failed to make operative the State savings statute. Moreover, the decision was contrary both to previous opinions of the Tennessee courts, holding that the statute should be given a liberal construction; *Nashville, Cincinnati and St. Louis Railway* v. *Bolton,* 134 Tenn. 447, 455, 184 S.W. 9 (1915); *Galbraith* v. *Kirby,* 109 S.W.2d 1168 (21 Tenn. App. 303 (1937); *Brooksbank* v. *Roane County,* 207 Tenn. 524, 341 S.W.2d 570 (1960); *Woods* v. *Palmer,* 496 S.W.2d 474 (Tenn. 1973); *Patrick* v. *Dickson,* 526 S.W.2d 449 (Tenn. 1975) and to this Court's decision in *Burnett* v. *New York Central Railroad Co.,* 380 U.S. 424 (1964), which strongly disapproved the invocation of a statute of limitations when the plaintiff had filed a prior timely action.

> "Both federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action soley because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. In both federal and state systems of justice rules have been devised to prevent this from happening. Thus, a federal statute, 28 U.S.C. §1406(a), allows a district court 'of a district in which is filed a case laying venue in the wrong division or district . . . if it be in the interest of justice,' to 'transfer

> such case to any district or division in which it could have been brought.' Congress thereby recognized that the filing of a lawsuit 'itself shows the proper diligence on the part of the plaintiff which . . . statutes of limitations were intended to insure. If by reason of the uncertainties of proper venue a mistake is made . . . "the interest of justice" may requires that the complaint . . . be transferred in order that the plaintiff not be penalized by . . . "time-consuming and justice-defeating technicalities."'." 380 U.S. 424 at 430.

After this unexpected and adverse ruling by the Tennessee Court of Appeals, the appellants proceeded forthwith to the Supreme Court of Tennessee, applying for permission to appeal. That permission was denied, *per curiam,* on September 4, 1979, the appellants having had no opportunity to present claims as to rights asserted under the United States Constitution. Those Constitutional issues, born in the decision of the Tennessee courts, can be raised in no forum other than this Court. As was held in *Saunders* v. *Shaw,* 244 U.S. 317 (1916):

> ". . . When the act complained of is the act of the [state] Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer has any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here [to the United States Supreme Court]. 244 U.S. 317, at 320.

REASONS FOR GRANTING THE WRIT

The question of whether a state may, consistent with the Full Faith and Credit Clause and with the Fourteenth Amendment to the United States Constitution, refuse recognition for purposes of its savings statute to a judicial proceeding brought in another state, solely for the

reason that it was brought in another state, is a substantial and novel question not heretofore passed upon by this Court. Resolution of the issue will have a substantial impact upon the rights of plaintiffs, potentially large in number, to have any hearing at all upon their transitory cause of action when those plaintiffs, having timely and in good faith filed a lawsuit, later are forced to refile that suit in a different state. Furthermore, the issue is of great importance to the interaction of the states in a federal system of government.

I.

THE TENNESSEE SAVINGS STATUTE, AS INTERPRETED BY THE COURTS OF THAT STATE, VIOLATES THE FULL FAITH AND CREDIT CLAUSE.

This Court has long held that, under the Full Faith and Credit clause, a state may not create a transitory cause of action and at the same time deny the right to sue in any court having jurisdiction. *Tennessee Coal, Iron and Railroad Company* v. *George,* 233 U.S. 354 (1914). Yet, the Tennessee courts have interpreted that state's savings statute so as to produce that clearly forbidden result. A severe penality is imposed, a penalty which could, as in this case, be so severe as the preclusion of the right to any trial upon a cause of action, if the plaintiff brings suit in a state other than Tennessee upon a claim grounded in Tennessee law and later is compelled to bring that action in the Tennessee courts. By granting the plaintiff a far longer period in which to pursue a cause of action if the suit is originally filed in Tennessee than if first brought elsewhere, the statute is made to have precisely the discriminatory effect which this Court has condemned. No reasonable person, aware

that Tennessee affords a bonus to those bringing a suit which arises under its laws in Tennessee courts, will sue anywhere other than Tennessee. The chilling effect which results from the interpretation of which these Petitioners complain, both upon the plaintiff's fundamental right to choose the forum in which to bring suit, and upon the practical utility of long arm statutes, the proper use of which has been consistently upheld by this Court, *e.g., International Shoe* v. *Washington,* 326 U.S. 310 (1945) renders that interpretation unconstitutional.

Nor is it necessary to consider the niceties of Constitutional interpretation to find the Tennessee savings statute, as construed by the courts of that state, unconstitutional.

The United States Constitution, Article IV, Section 1, and 28 U.S.C. § 1738, enacted pursuant to that Article, mandate that the courts of every State give to the Acts, Records and Judicial Proceedings of another State the same Full Faith and Credit as they have by law or usage in the State from which they are taken. *Hampton* v. *McConnel,* 3 Wheaton (16 U.S.) 234 (1818). It is clear in the instant case that the suit instituted by these petitioners in Illinois was sufficient to make operative the savings statute of Illinois. *Roth* v. *Northern Assurance Company,* 32 Ill.2d 40, 203 N.E.2d 415 (1965). The Tennessee court, asserting no recognized exception to the Full Faith and Credit clause, nor any other controlling legal principle to justify its result, has refused to give that Illinois judicial proceeding the same effect in Tennessee as it was entitled to receive in Illinois. The Constitution, however, by its plain words, compels that the courts of a State give full faith and credit to a judicial proceeding brought in a foreign State just as it must to a statute enacted in a foreign State. Unless the framers

of the Constitution meant something other than what they plainly said, the Tennessee savings statute, as interpreted, is unconstitutional.

Moreover, the interpretation produces two incongruous results. The Illinois judicial proceeding brought by these petitioners resulted in a judgment which is clearly entitled to recognition by the Tennessee courts. It would be strange indeed if the judgment rendered after a judicial proceeding were entitled to recognition, but the proceeding which begat the judgment were treated as a nullity. Further, the plaintiff, whose lawsuit would be preserved in *either* State had it been continuously prosecuted there, finds that merely by crossing the State line, the rights are extinguished.

It is worthy of note that the savings statutes of sixteen States have been interpreted upon the question of whether an action commenced in a foreign State tolls the forum statute of limitations. Ten of those decisions, including that which these petitioners contest, held that bringing such an action did not;[1] six have held that it

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[1] Mississippi: *C. & L. Rural Electric Cooperative Corp.* v. *Kincade,* 175 F.Supp. 223 (N.D. Miss. 1959); New York: *Baker* v. *Commercial Travelers Mutual Accident Association,* 161 N.Y.S.2d 332 (1957); North Carolina: *High* v. *Broadnax,* 271 N.C. 313, 156 S.E.2d 282 (1967); Ohio: *Howard* v. *Allen,* 30 Ohio St.2d 130, 283 N.E.2d 167 (1972); Oklahoma: *Herron* v. *Miller,* 96 Okla. 59, 220 P. 36 (1923); Pennsylvania: *Overfield* v. *Pennroad Corp.,* 146 F.2d 889 (1944); Texas: *Scurlock Oil Company* v. *Three States Contracting Co.,* 272 F.2d 169 (1959); West Virginia: *Stare* v. *Pearcy,* 401 F.Supp. 994 (1957); Wyoming: *Riley* v. *Union Pacific Railroad Co.,* 182 F.2d 765 (1950); Tennessee: *Elias* v. *A & C Distributing Co.,* ..... Tenn. ..... (1979).

does.[2] The opinions evidence regrettably little substantive evaluation of the issue. Four of the courts were satisfied to decide the issue with no discussion at all.[3] Six others, including the Tennessee court, placed decisive reliance upon the majority vote of courts having previously ruled on the matter.[4] Of the four decisions giving extensive and original consideration to this important question, three (*Cook* v. *Britt, supra*; *Abele* v. *A.L. Dougherty Overseas, Inc., supra*; and *Leavy* v. *Saunders, supra*) have held a savings statute is made operative by the commencement of an action in a foreign state. The fourth, *Howard* v. *Allen, supra,* held otherwise, but also relied heavily upon the "scoreboard" method of decision.

This Court, by ruling on the issues presented in this petition, can bring order from the chaos which presently exists owing to the diametrically opposite interpretations of savings statutes having, *prima facie,* the same import. By holding that the Full Faith and Credit clause requires a State to give recognition to a foreign judicial proceeding for purposes of its savings statute, this Court will insure that the rights of litigants who timely file a cause of action are preserved, and will insure that the policies

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[2] Arkansas: *McCreary* v. *United States Fidelity & Guaranty Co.,* 110 F.Supp. 545 (D.C.S.C. 1953); California: *Schneider* v. *Schimmels,* 256 C.A.2d 366 (1967); Delaware: *Leavy* v. *Saunders,* 319 A.2d 44 (Del. Super. 1974); Illinois: *Cook* v. *Britt,* 8 Ill.App.3d 668, 290 N.E.2d 908 (1972); Indiana: *Abele* v. *A.L. Dougherty Overseas, Inc.,* 192 F.Supp. 955 (N.D.Ind. 1961); Massachusetts: *Caldwell* v. *Harding,* 4 Fed. Cas. 1036 (C.C.D. Mass. 1869).

[3] *Herron*; *Overfield*; *Scurlock Oil Co.*; *McCreary.*

[4] *Elias*; *Riley*; *C. & L. Rural Electric Cooperative Corp.*; *Baker*; *Stare*; and *High.*

of long-arm statute jurisdiction and of allowing the plaintiff to choose the forum in which to bring suit, long-favored by this Court, will not be eroded in a means which serves no useful purpose and offends the Constitution.

II.

THE TENNESSEE SAVINGS STATUTE, AS INTERPRETED BY THE COURTS OF THAT STATE, VIOLATES THE RIGHTS TO PRIVILEGES AND IMMUNITIES, DUE PROCESS OF LAW, AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Neither the language of the Tennessee savings statute nor the interpretation of that statute by the Tennessee courts purports to effect a direct discrimination against persons not residents of Tennessee. Discrimination, however, is no less objectionable because it is subtle, and the statute, as interpreted, clearly works in a discriminatory fashion. The savings statute plainly differentiates on the basis of the State in which suit is brought. Simply stated, the bringing of an action in Tennessee prolongs the life of a suit not dismissed upon the merits, whereas bringing the same suit in another State does not. It is axiomatic, given a transitory cause of action, the availability of long-arm statutes for jurisdictional purposes, and the well-recognized policy, which this Court approved in *Gulf Oil* v. *Gilbert,* 328 U.S. 830 (1945), of allowing the plaintiff to choose the forum in which suit will be brought, that persons not residents of Tennessee are far more likely to bring suit outside Tennessee than are Tennessee residents and are therefore far more likely to be adversely affected by the Tennessee savings statute.

Undeniably, then, the Tennessee statute discriminates against persons not Tennessee residents seeking access to that State's courts, but does that discrimination fall within the realm deemed permissible by this Court? Petitioners submit that it does not, in that it fails to afford a reasonable and adequate time in which to pursue a cause of action as required by the decisions of this Court in *McKnett* v. *St. Louis and San Francisco Railroad Company,* 292 U.S. 230 (1933), and *Canadian Northern Railroad Company* v. *Eggen,* 252 U.S. 553 (1919).

It is conceded that the Tennessee statute of limitations, providing in this instance, one year in which to bring a cause of action, applies to residents and non-residents alike, and affords the non-resident that period of time in which to sue. It is not, however, the statute of limitations which these Petitioners challenge. The Tennessee savings statute comes into play once a judgment, not final on the merits, has been rendered against a plaintiff, or an earlier judgment for that plaintiff has been reversed. From that point in time, such a plaintiff is given one additional year in which to perfect and re-bring the same cause of action, but only if the suit was originally brought in Tennessee. The plaintiff who originally brings suit in a jurisdiction other than Tennessee, but who is thereafter remanded to Tennessee courts because of an adverse ruling on the issue of jurisdiction, or for some other reason, is entitled to none of this extension. Although the defendant has had ample notice of a pending suit, that plaintiff is denied the right to sue at all unless the suit can still be brought within the original statute of limitations. Given the regrettably slow place at which litigation proceeds, this is a vain hope at best. (Not incidentally, this interpretation of the Tennessee savings statute gives

the defendant in a suit based upon a Tennessee cause of action but brought in the courts of another State an almost irresistable incentive to protract the litigation.) Whatever may be thought a reasonable and adequate time in which to pursue a cause of action, zero days cannot be so considered.

Petitioners further assert a denial of Due Process. Due process requires the opportunity to be heard in a meaningful proceeding, and while it does not require a day in court for every suitor upon every allegation, it does require that opportunity to be heard not to be denied on grounds offensive to the Constitution. These Petitioners have been denied a hearing by the Tennessee courts on the basis of a statutory interpretation which is repugnant to the Full Faith and Credit and Privileges and Immunities Clauses of the Constitution. They have been denied Due Process thereby and should now be given a hearing.

Similarly, these Petitioners, because they exercised an unquestioned right to file suit in the jurisdiction of their choice, and that choice was not a Tennessee court, have been denied benefits of a savings statute which would have obtained had the suit been filed in Tennessee. Clearly, Equal Protection has been denied, and while that in itself does not finally determine the question of a constitutional violation, it is for those who seek to uphold such a denial to justify the result. The Tennessee courts have offered no rational relationship to any legitimate state purpose which might justify such a denial. It has neither been shown nor argued that the purpose of the Tennessee statute of limitations is any more compromised if the running of that statute is tolled by the institution of an Illinois proceeding than by the institution of a suit

in Tennessee. Any legitimate purposes which the discrimination might serve remain for the respondents to assert. These Petitioners respectfully submit that there are none, that Equal Protection has been denied, and that this Court should so hold.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and decisions of the Tennessee Supreme Court.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS, b/n/f, ANTOINE WADIEH ELIAS, CLAUDETTE PAULINE ELIAS, b/f/n ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR and LOUIS TAZBAZIAN,

Plaintiffs-Appellees,

vs.

A & C DISTRIBUTING COMPANY, INC., and GERETT LEE JOHNSON,

Defendants-Appellants.

DAVIDSON LAW

Appealed from the First Circuit Court of
Davidson County, Tennessee
Honorable ROBERT E. LILLARD, *Judge*
(Filed: Jun 29 1979)

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THOS. A. SHRIVER
Presiding Judge

REVERSED AND DISMISSED

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS, b/n/f, ANTOINE WADIETH ELIAS, CLAUDETTE PAULINE ELIAS, b/f/n ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR and LOUIS TAZBAZIAN,

Plaintiffs-Appellees,

vs.

A & C DISTRIBUTING COMPANY, INC., and GERETT LEE JOHNSON,

Defendants-Appellants.

DAVIDSON LAW

OPINION

Counsel for defendants-appellants makes a clear and succinct statement of the case, which statement is adopted and agreed to by counsel for the appellees. Said statement is as follows:

> "This is a discretionary appeal, pursuant to T.C.A. §27-305, from an interlocutory order of the Circuit Court for Davidson County, denying defendants' motion to dismiss the action. Honorable Robert Lillard, Trial Judge, has certified to this Court that he is of the opinion that his order denying defendants' motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from his order may materially advance the ultimate termination of this litigation.
>
> The only pleadings filed thus far in this action are plaintiffs' complaint and defendants' motion to dismiss. For the purposes of determining the motion to dismiss presented to the Trial Court, the parties stipulated certain facts incorporated in an agreed order made part of the technical record.
>
> The complaint in the instant case purports to state a cause of action based upon an automobile accident which occurred in Nashville, Tennessee on May 21, 1976. The complaint was filed April 17, 1978.

> Defendants moved to dismiss the complaint as to all of the adult plaintiffs on the ground that the claim stated in the complaint accrued more than one year before commencement of this action and is therefore barred by the provisions of T.C.A. §28-304, the Statute of Limitations. Although not averred in the complaint, plaintiffs resisted the motion to dismissed by asserting the Tennessee "saving statute," T.C.A. §28-106, plaintiffs having originally filed this action in the state courts of Illinois, and the action having been dismissed without prejudice.
>
> The controlling question of law certified to this Court is whether the commencement of an action in a foreign state court tolls the running of the Tennessee Statute of Limitations against an action for the same cause and between the same parties subsequently filed in Tennessee, when Tennessee is both the forum state and the state where the cause of action arose.
>
> It is appellants' contention that T.C.A. §28-106 applies only to actions commenced in a Court within Tennessee."

Stipulation

For the purpose of determining defendants' motion to dismiss, the parties stipulated the following facts:

"AGREED ORDER

> "It appearing to the Court as evidenced by signatures of counsel for the parties hereto that, for the purposes of determining the Motion presently before the Court to dismiss the plaintiff's Complaint, the parties have agreed, and
>
> IT IS, THEREFORE, ORDERED ADJUDGED, AND DECREED that the following facts have occurred and are to become a part of the record herein for all purposes necessary:
>
> 1. The plaintiffs are citizens and residents of Chicago, Cook County, Illinois with the exception of plaintiff Louis Tazbazian who is a citizen and resident of Montreal, Canada.

2. The defendants are citizens and residents of Tennessee.

3. The automobile accident out of which this claim arises occurred in Nashville, Tennessee.

4. May 21, 1976 — Date of accident.

5. May 12, 1977 — Summons and complaint were filed in the Circuit Court of Cook County, Illinois.

6. June 13, 1977 — Upon motion of defendant, order of the Circuit Court of Cook County, Illinois was entered dismissing the plaintiffs' complaint for lack of jurisdiction.

7. July 20, 1977 — Order vacating the order of June 13, 1977, and providing the same language of dismissal but with the addition with prejudice.

8. August 19, 1977 — Third order affirming the original dismissal order on June 13, 1977, but changing the language to state with prejudice solely on the issue of Illinois jurisdiction.

9. April 17, 1978 — Summons and complaint filed in the Circuit Court for Davidson County, Tennessee, and assigned to the First Circuit Court.

/s/ Robert E. Lillard JUDGE

APPROVED FOR ENTRY:
/s/ Joe P. Binkley, Jr.
Attorney for Plaintiffs
/s/ Gerald M. Walanka
Attorney for Plaintiffs (Signed
by JPBJr. with permission)
/s/ Bernard M. Rosenblum
Attorney for Defendants"

The original complaint herein was filed April 17, 1978 and purports to state a cause of action for personal injuries resulting from an automobile accident which occurred in Nashville, Tennessee on May 21, 1976. Thus it is seen that the complaint was filed almost two years after the accident in which the injuries are alleged to have occurred.

Defendants-appellants filed their Motion to Dismiss on May 10, 1978, which is as follows:

"MOTION TO DISMISS — STATUTE OF LIMITATIONS DEFENSE

Come now the defendants and move the Court to dismiss the actions filed on behalf of ANTOINE WADIEH ELIAS, ROSE ELIAS, FAHIMA ABDEL MESSIH SAFAR and LOUIS TAZBAZIAN (all plaintiffs with the exception of the two minors) on the ground that it is apparent from the complaint that the claims stated in the complaint on behalf of the above listed plaintiffs accrued more than one year before commencement of this action and are therefore barred by the provisions of T.C.A. §28-304.

As set out in Paragraph One of the complaint, it is alleged that the cause of action of the plaintiffs accrued on or about May 21, 1976. The filing of the complaint in commencement of this action was made on April 17, 1978.

/s/ Bernard M. Rosenblum
Levine & Rosenblum
18th Floor, Life & Casualty Tower
Nashville, Tenn. 37219
Attorneys for Defendants"

Plaintiffs-appellees seek to avoid the bar of the Tennessee Statute of Limitations by asserting the "Tennessee Saving Statute," T.C.A. §28-106.

Section 28-304, T.C.A., Personal tort actions, provides that "actions for injuries to the person . . . shall be commenced within one (1) year after the cause of action accrued."

Section 28-106, T.C.A., New action after adverse decision not foreclosing merits, provides:

"If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action . . . the

plaintiff may, from time to time, commence a new action within one (1) year after the reversal or arrest."

In Moran v. Weinberger, 149 Tenn. 537, 260 S.W. 966 (1923), it was said that this statute is remedial and is to be liberally construed, but protection against laches, negligence, or other fault of the plaintiff was no part of its purpose.

Assignments of Error

There are two assignments, as follows:

"I. The Trial Court erred in holding that the Tennessee saving statute, T.C.A. §28-106, applies to suits instituted in foreign state courts when Tennessee is now the forum state and the state where the cause of action arose.

II. The Trial Court erred in holding that plaintiffs' cause of action is not barred by the Tennessee Statute of Limitations, T.C.A. §28-304."

It is argued by counsel for appellants that since plaintiffs' complaint shows on its face that the claim sued on is barred by the Statute of Limitations, and since appellants have filed a motion to dismiss upon that ground, the burden of proof is upon the plaintiffs to show that their present action falls within the saving statute, citing Knox County, Tennessee v. Moncier, 224 Tenn. 361, 455 S.W. 2d 153, 158 (1970) and East Tenn. Coal Co. v. Daniel, 100 Tenn. 65, 42 S.W. 1062 (1897).

The facts shown by this record, briefly stated, are that the accident out of which this claim arose occurred in Nashville, Tennessee May 21, 1976; that the defendants are residents of Tennessee, while the plaintiffs-appellees are residents of Illinois, with the exception of plaintiff Louis Tazbazian who is a resident of Canada.

Plaintiffs originally commenced this action in the Circuit Court of Cook County, Illinois three hundred and

fifty-six days after the date of the accident, which suit in the Illinois Court was dismissed for lack of jurisdiction on June 13, 1977.

On April 17, 1978, twenty-three months after the accident, plaintiffs-appellees filed the complaint in the instant case in the Circuit Court of Davidson County, Tennessee.

It is asserted by appellants, and we concur in the conclusion, that the place where the tortious conduct of the defendants is alleged to have been committed is now the forum state for judicial determination of the instant case, and the law of Tennessee determines the rights of the parties to this action. Restatement, Conflict of Laws, §378; Telecommunications, etc. v. Southern Tel. Supply Co., 518 F. 2d 392 (1975); Winters v. Maxey, 481 S.W. 2d 755 (Tenn. 1972), wherein it was held as follows:

"Absent public policy to the contrary, the law of the state in which the tort occurs controls.

"If the law of jurisdiction in which the tort occurred is against good morals or natural justice, or for some other reason, its enforcement would be prejudicial to the general interests of the state's citizens, such law would not be controlling in an action which is brought in the state and which arises out of tort."

On the question whether the commencement of an action in a foreign state tolls the running of the Tennessee Statute of Limitations against an action for the same cause and between the same parties subsequently filed in Tennessee, numerous authorities have been cited by counsel for both appellants and appellees and it *definitely appears that the majority rule as announced in decisions of the courts of numerous other jurisdictions is that an action in a foreign state does not toll the running of the Statute of Limitations in the state where the cause of action arose.*

It is pointed out that there is no reported decision of the Appellate Courts of Tennessee which is addressed to the specific issue presented in this case, except perhaps the old case of *Shelton* v. *Johnson,* decided in 1857 and reported in 36 Tenn. 672, wherein our Supreme Court held that a suit in Virginia was not lis pendens of the subject matter in Tennessee and that plaintiff's claim was barred by the Tennessee Statute of Limitations. The Court stated as follows:

> "It is a very strong and forced presumption to make, in most cases, within the same State, that all its citizens have knowledge or notice of all the suits that may be pending in all the Courts of record in the State. But though we know it is the presumption of an impossibility, yet the urgent policy of the rule has forced its adoption. But it would be an absurd and unreasonable extension of it to make it apply to every court in the Union. This would shock the common sense of mankind, and bring odium upon the whole doctrine. The phrase thrown out in the books, laying down the rule that 'lis pendens is notice to all the world,' must be limited in its construction to all persons within the jurisdiction or State where the suit was pending. It cannot be carried further upon correct principles or reason, and there is no authority on the question to control us."

While the decisions of Federal District Courts are not binding authority upon this Court and other State Courts in Tennessee yet from time to time we find the reasoning in the decisions of a Federal District Courts to be useful and persuasive.

In *Sigler* v. *Youngblood Truck Lines,* 149 F. Supp. 61 (1957), the United States District Court for the Eastern District of Tennessee definitively held that under Tennessee law, the words, "If the action is commenced within the time limited a rule or Statute of Limitation," contained in the Tennessee Savings Statute (§28-106, T.C.A.),

have reference to actions commenced in Tennessee Courts only, and that commencement of an action in a state other than Tennessee does not toll the Statute of Limitations in this State. In that case the Court stated: inter alia, as follows:

> "It is obvious that the words, 'If the action is commenced within the time limited by a rule or statute of limitations * * *' contained in Sec. 28-106, have reference to actions commenced in Tennessee Courts only. If the Legislature had intended to include actions commenced in foreign states, it could have easily said so, as was said by the Kentucky Legislature. The fact that this section is a part of the chapter containing Tennessee's general provisions of statute of limitation buttresses this conclusion. The general rule is that the commencement of an action in one state does not toll the statute of limitations in another state, unless the applicable statute so provides." [p. 67]

We find that the general rule, as stated in *Corpus Juris* and *American Jurisprudence,* is as follows:

> "A statute permitting a new action to be instituted after failure of the original action has been held inapplicable where the original action was instituted in another state. 54 C.J.S., §288-c
>
> "The commencement of an action in one state does not toll the running of limitations against an action for the same cause and between the same parties in another state. 54 C.J.S., §299
>
> "As a general rule, the commencement of an action in one state does not toll the running of limitations on the same cause of action in another state. 51 Am. Jur. 2d §201.
>
> "Where the action is regarded as controlled by the statute of limitations of the forum, it has usually

been held that a plaintiff invoking the savings statute of the forum may not rely upon a nonsuit in an earlier action brought in another state." 51 Am. Jur. 2d §306.

We are impressed that the decisions cited in the brief of counsel for appellees, while pertinent and persuasive, do not alter the proposition that the vast majority of the courts of last resort in other jurisdictions have held that suits in a foreign state do not toll the Statute of Limitations in the state of original jurisdiction unless the statute of that state specifically so provides.

It is pointed out by counsel for appellants that the following States adhere to the general rule that the commencement of an action in one states does not toll the running of the Statute of Limitations against an action for the same cause and between the same parties brought in another state, those States being: Kansas, Mississippi, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Wyoming, and West Virginia.

While we have not made an exhaustive review of the authorities, we are impressed that the argument of counsel for appellants is reasonably accurate that the remaining states other than those above listed here have not addressed the specific issue involved in the instant case or have savings statutes differing from the Tennessee statute involved herein and that some of those states have addressed the issue of the interpretation of their savings statute only in the context of cases in which the cause of action arose in a foreign state, thereby necessitating the importation of law foreign to the forum, under the conflict of laws principles.

It is with these distinctions that we find the cases recited and relied on by counsel for appellees to be distinguishable and, thus, not binding or conclusive on the Courts of Tennessee.

For reasons indicated, we are of opinion that Tennessee adheres or should adhere to the majority rule and that the assignments should be sustained.

It results that the judgment of the Trial Court is reversed and the plaintiffs' cause of action is dismissed as having been barred by the Statute of Limitations of Tennessee.

Reversed and Dismissed.

/s/ Thos A. Shriver
Thos A. Shriver
Presiding Judge

Drowota, J., Concurs
Lewis, J., Concurs

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS BY NEXT FRIEND AND FATHER, ANTOINE WADIEH ELIAS, CLAUDETTE PAULINE ELIAS BY NEXT FRIEND AND FATHER, ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR, ALL CITIZENS AND RESIDENTS OF CHICAGO, COOK COUNTY, ILLINOIS, AND LOUIS TAZBAZIAN, A CITIZEN AND RESIDENT OF MONTREAL, CANADA,

Appellants,

vs.

A & C DISTRIBUTING COMPANY, INC., A TENNESSEE CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF TENNESSEE, AND, IT'S AGENT, SERVANT, AND EMPLOYEE, GERETT LEE JOHNSON, A CITIZEN AND RESIDENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,

Appellees.

DAVIDSON LAW

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Antoine Wadieh Elias, et al., is denied at cost of the applicanta.

PER CURIAM